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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

83415-6

No. 26677-0-III

IN THE COURT OF THE APPEALS
OF THE STATE OF WASHINGTON

DIVISION III

THE STATE OF WASHINGTON, Respondent

v.

WILLIAM A. BROUSEAU, Appellant.

SUPPLEMENTAL BRIEF OF RESPONDENT

JOSEPH J.A. JACKSON
Asotin County Deputy
Prosecuting Attorney
WSBA #37306

P. O. Box 220
Asotin, Washington 99402
(509) 243-2061

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PREFACE

In anticipation of the Appellant's Supplemental Opening Brief the State addressed much of the Appellant's arguments in its original brief. For purposes of this Supplemental Brief, the State will rely on the facts as presented in its original brief with the intent of addressing only the issues raised in the Appellant's Supplemental Opening Brief.

II. ISSUES

1. Does a Competency Hearing Held Without the Challenged Witnesses' Testimony Violate Due Process?
2. Does the Unavailability Provision of the Child Hearsay Statute Apply When the Child Testifies At Trial?

III. ARGUMENT

1. A Competency Hearing Held Without the Challenged Witness Does Not Violate Due Process.
2. Does the Unavailability Provision of the Child Hearsay Statute Apply When the Child Testifies At Trial?

IV. DISCUSSION

1. A Competency Hearing Held Without the Challenged Witness Does Not Violate Due Process.

ER 601 states that “[e]very person is competent to be a witness except as otherwise provided by statute or court rule.” ER 601. While there is no statute addressing the competency of child witnesses, CrR 6.12(c) states that “[t]he following persons are incompetent to testify: (1) Those who are of unsound mind...and (2) children who do not have the capacity of receiving just impressions of the facts about which they are examined or who do not have the capacity of relating them truly.” CrR 6.12(c). Based on this scheme, Washington courts have reasoned that children, like all other people, are presumed competent to testify. See, e.g., State v. C.M.B., 130 Wn.App. 841, 842, 125 P.3d 211 (Div. 1, 2005), *review denied by*, State v. Boebert, 158 Wn.2d 1007, 143 P.3d 829 (2006). Because of this, “the trial court is under no obligation to rule on the competency of any witness, absent a challenge by any party to the witness's competency.” Id.

In this case, the Court considered the expert testimony of Dr. Mabey, a licensed psychologist, who interviewed J.R. prior to the competency hearing. Based on the opinions and testimony of the defense expert, the Court found that all five of the factors set

forth in State v. Allen, 70 Wn.2d 690, 424 P.2d 1021 (1976), were met. (RP 115-119). While viewing the child on the stand is certainly one way for a trial judge to consider a child's competency, nothing in the law says that a trial judge cannot rely on information gained from the testimony of a psychologists who examined the child in making his determination that a child is competent. Ample case law exist in which children J.R.'s age and younger have been deemed competent to testify. See: State v. Perez, 137 Wn.App. 97, 151 P.3d 249 (Div. III, 2007) *Four-year-old child was competent to testify*; State v. Woods, 154 Wn.2d 613, 114 P.3d 1174 (2005) *Victims who were three-years-old and five-years-old during the time of the alleged molestation and only four-years-old and six-years-old at the time of trial competent to testify*; State v. Avila, 78 Wn.App. 731, 899 P.2d 11 (Div. I, 1995) *No abuse of discretion in finding five-year-old child competent to testify about abuse committed when child was four-years-old*; State v. Stange, 53 Wn.App. 638, 769 P.2d 873 (Div. I, 1989) *Four-year-old victim was competent to testify*. A reviewing court should not overturn a finding of competence absent a manifest abuse of discretion. State v. Perez, 137 Wn.App 97. There is nothing in this record to suggest that J.R. was not legally competent to testify or that the trial judge abused his discretion in finding her competent. As such, the finding should

not be overturned.

The Appellant argues in his Supplemental Opening Brief that not having the child witness testify at the Competency Hearing violates due process. "The procedure at child competency hearings, lies within the sound discretion of the trial judge." State v. Maule, 112 Wash. App 887, 51 P. 3d 811, 814 (2002). After quite some time reviewing case law, the State is unable to find a single case which requires a child to testify at a competency hearing. In this case, the Court relied on the expert testimony of Dr. Mabee to determine that the child victim was competent to testify. The experts testimony was sufficient, and the State chose not to put the victim on the stand. To hold that where an expert testifies as to competence, a child must testify to be found competent would be an absurd result; especially in the context of a child sexual assault case, where victims are often intimidated in the courtroom by the presence of their abuser.

A reviewing court can look at the entire record to review a competence determination. State v. Guerin, 63 Wash.App 117; 816 P.2d 1249 (1991). In this case, the child victim testified at trial. The transcript of the child's testimony clearly shows that the Court Commissioner's ruling as to her competence was not in error. Therefore, any perceived procedural error would be harmless. In

the event that the Court finds error, and finds that the error was not harmless, the proper remedy would not be overturning the Appellant's conviction. The proper remedy would be to remand the case for a hearing on competence. Should the child again be found competent, the conviction would stand.

The record makes clear that the child was competent to testify in this case. In many cases, it may be necessary for a child to testify at a competency hearing, but the law does not mandate it in every case. Under the facts of this case, there was no error caused by the child not testifying at the child competency hearing. The Court Commissioner properly examined the child's competence by listening to the testimony of the expert.

2. Does the Unavailability Provision of the Child Hearsay Statute Apply When the Child Testifies At Trial?

In his Supplemental Opening Brief, the Appellant argues that the Child Hearsay Statute, RCW 9A.44.120, requires a showing of unavailability if the child does not testify at the pretrial child hearsay hearing. The Statute makes no such requirement. In order for the hearsay statements of a child victim to be admitted, the court must find, "in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and the child either testifies at the

proceedings, or is unavailable as a witness.” RCW 9A.44.120. In this case, the Court Commissioner held a proper hearing prior to trial and found that the statements had sufficient indicia of reliability. The Child Victim then testified at the trial. Because the Court properly held a hearing and found the statements reliable and the child testified at trial, all of the requirements of the Child Hearsay Statute were met. The Appellant relies on State v. Hopkins, 137 Wn. App. 441 (Div. 2, 2007), for the proposition that the statute requires that the child either testify at, or be found to be unavailable for the child hearsay hearing conducted outside of the presence of the jury. Hopkins simply does not support that argument. In Hopkins, the parties stipulated that the child was not competent and child hearsay statements were allowed at trial due the child’s unavailability. The Hopkins Court held that the admission of the child hearsay statements was in error because the trial court had not independently conducted a hearing as to the child’s availability to testify at trial. In this case, the child testified at the trial, which satisfies the statute with regard to child hearsay statements and no error occurred.

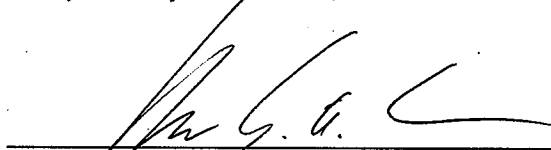
V. CONCLUSION

The law does not require that a child witness testify in a competency hearing. In this case, procedural due process

requirements were met because the Court Commissioner considered the testimony of an expert witness in deciding whether the child victim was competent to testify at trial. The Court Commissioner also properly conducted a child hearsay hearing outside the presence of the jury and the child victim testified at trial. Therefore, all of the requirements of RCW 9A.44.120 were met and the unavailability requirement is not implicated. The Appellant's arguments are without merit and the case should be affirmed.

Dated this 27 day of March, 2009.

Respectfully submitted,



JOSEPH J.A. JACKSON, WSBA#37306
Attorney for Respondent
Deputy Prosecuting Attorney for Asotin County
P.O. Box 220
Asotin, Washington 99402
(509) 243-2061